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The Nuremberg Clause: Practical and applicative profiles in the European Court's jurisprudence

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Abstract: The present work has tried through the jurisprudence of the ECtHR to give some precise interpretations during the time but also from the cases using Art. 7 ECHR and the Nuremberg clause. In such cases, the judges express dissenting opinions showing the difficulty of following a univocal, rigorous and precise path on the interpretation of certain articles. Many times the national judges are inspired by the relevant facts which show that each case follows different ways against the punishment of crimes against humanity offering thus a barrier and showing that the Nuremberg clause has a lot of history behind it and even more for the coming years.

Keywords: ECHR; EctHR; Nuremberg clause; crimes against humanity; international jurisprudence; Art. 7 ECHR.

Introduction

Par. 2 of Art. 7 of the European Convention of Human Rights (ECHR) refers precisely to the legality and irretroactivity of the incriminating or aggravating of penal provisions of the disciplinary treatment. It does not include the punishing of perpetrator for an action or omission which at the moment of its realization constituted a crime according to the general principles of law recognized by civilized nations. These fundamental principles are based on Art. 38 of the Statute of the International Court of Justice (StICJ) and were seen as principles of legal logic, i.e. formulas id nemo judex in re di lui, il claris non fit interpretatio, ne bis in idem, etc., included in the category that aims to safeguard human dignity and protect human rights. The uncertainties of Art. 38 StICC affect the interpretation of Art. 7, par. 2 ECHR as general principles of law inferable from all the national legal systems of the Member States of the international community, such as ius commune which allows the retroactive application of penal provisions to punish legitimately without incurring a violation of the principle as well as to facts of exceptional gravity at the time of their commission which were not clearly punishable under domestic and international law. The rule in question is not a derogation of par. 1 of Art. 7 ECHR despite the tendency to weaken the absolute and non-derogable scope in time of war, the principle

of legality, the non-retroactivity in criminal matters and of the fundamental explanations, such as the prohibition of analogy, and the principle of certainty having inferior constitutional rank in the contracting states' legal systems. Due to the interpretative uncertainties, the provision is interesting from a historical point of view.

The continuous progress of international criminal law helps the transfusion of international crimes and serious violations into norms of customary international law and treaty that takes place in recent decades reducing thus the scope of application of the norm in question to the advantage of that contained in Art. 7, par. 1 without excluding that the rule may also have application outside the historical context and the type of criminal conduct for which it was conceived. The Nuremberg principles include a broader interpretation which makes crimes of a different nature applicable and above all beyond the particular historical situation in relation to what it was introduced and oriented by the judges of Strasbourg. These are rules of an international moral nature oriented and aimed at the punishment of international crimes. These are not always adequately positivised in domestic and international law for whose application it could prove to be a certain provision in question to the general principles of law and desirable to guarantee the individual involved to a very cautious use of these principles

due to the difficulty of interpretation. It is easy thus to establish the punishable conduct legitimately based on Art. 7, par. 2 ECHR constituting crimes according to the general principles of law recognized by civilized nations.

Within this context it is very difficult to seek a reserve of law in a community of equals, as well as to explain the logic of the separation of powers (par in parem non habet imperium) where the transition from a lex to a ius puts international criminal law precisely renounce predictability and knowability (nullum crimen sine iure stricto, certo et praevio). It is doubtful that the general principles have the ability to typify conduct as a task of rules equipped with a degree of determination that reasonably ask criminal law to come from the international community. Conventional legality is unitary and crimes are examined in the context of international law with the same parameters used for domestic law based on the former Art. 7, par. 1 European Convention of Human Rights (ECHR) (Sudre, 2021; Villiger, 2023).

The reduction ad unum which abstracts al nullum crimen sine iure takes into consideration the hierarchical order of the international legal system which is recovered with the statute of the International Criminal Court (StICC), as a subsidiary and interpretative function of the general principles.

The state punishment of a crimen iuris gentium is legitimate to the extent of the ECHR itself where it passes from a contractual and customary right to an affirmation of accessibility and foreseeability of the prohibition. The prohibition of the general principles consolidated with the commission of the fact specify in a technical sense but do not establish. The hermeneutic doubts are sterilized by a subversion of the general principles according to Art. 7, par. 2 ECHR (Sudre, 2021), as a justified need to take into account the normative contingencies introduced by the same article in question.

It is an incomplete study, very theoretical and without an empirical verification of conventional jurisprudence given that the argumentative passages are apodictic in the face of non easy pronunciations (Vehabović, 2016; Panov, 2016; Rychlewska, 2016; Mettraux, 2020; De Souza Dias, 2020; Sudre, 2021; Rainey, Wicks, Ovey, 2021; Reves, 2022; Villiger, 2023)[1]. The method used is that of accommodation on two aspects that are connected to each other: the operating mechanism and the

1See ex multis: ECtHR, Vasiliauskas v. Lithuania of 20 October 2015; Maktouf and Damjanović v. Bosnia Herzegovina of 18 July 2013; Kononov v. Latvia of 17 May 2010; Ould Dah v. France of 17 March 2009; Korbely v. Hungary of 19 September 2008; Jorgic v. Germany of 12 July 2007; Linkov v. The Czech Republic of 7 December 2006; Penart v. Estonia of 24 January 2006; Kolk and Kislyiy v. Estonia of 17 January 2006; Larionovs and Tess v. Latvia of 3 December 2002; Papon v. France of 15 November 2001; Streletz, Kessler, Krenz v. Germany of 22 March 2001; K.-H. W. v. Germany of 22 March 2001; Naletilić v. Croatia of 4 May 2000; Touvier v. France of 13 January 1997; X. v. Belgium of 18 September 1961; X. v. Norway of 30 May 1961; De Becker v. Belgium of 9 June 1958; B. v. Belgium of 20 July 1957.

application spectrum of par. 2. Thus the hermeneutical reconstruction which is imposed by the ECHR itself as a viva voc conventionis in relation to Art. 7 and 8 ECHR, i.e. general exception rule or restricted exception rule as clarification. This is a second path that we must take into consideration if the Nuremberg clause is deduced from the preparatory works relating to the conduct of war crimes, the Nazis and the crimes committed during the Second World War. A path that is reinforced by the European Court of Human Rights (ECtHR) as a living instrument of interpretation according to the present-day conditions in evolution (Sudre, 2021)[2].

Mechanism and functioning of the Nuremberg clause. Functionality and breadth

As we understood Art. 7, par 2 ECHR (Villiger, 2023) is an article that includes the principle of conventional legality while remaining faithful to the statement that:

"(…) the provisions of the ECHR. are alive in the interpretation given by the European Court (…)" (Mariniello, 2013).

In practice, the Nuremberg clause is a crucial point as regards guarantees and is reduced to a stylistic formulation where the ECtHR in reality:

"(...) does not reveal or hide, but gives signs (...)" (Mariniello, 2013).

In our opinion, this is a fairly superficial statement because the judges are hardly thoughtful and clear enough in the idea of its

2ECtHR, Tyrer v. United Kingdom of 25 April 1978.

relationship with the crimina iuris gentium, as guaranteeing instances relating to penal legality that come out more strengthened by abstract positions. Thus, Art. 7, par. 2 ECHR presents itself as an exception and with the paradox of a generalized rule[3] that grows and becomes an "offshoot"[4] over time.

This is an extending exception and should be understood as:

"(...) contextual clarification in the context of the mandatory nature of that rule [non-retroactivity], to ensure the validity of the punishments, after the Second World War (…). The ECtHR will not expressly say that the general principles of law end up becoming one of the contents (alongside treaties and customs) of "international law" ex par. 1 (...)"[5].

An easily understandable reason

The nullum crimes within the international community has been presented as a general principle of an autonomous nature which has taken into consideration the typifying capacity and non-retroactivity addressed in the existence of the requirements of accessibility and predictability as well as the de facto foundation

3ECtHR, Touvier v. France of 27 November 1992, "(…) the Commission must now examine whether the exception provided for in paragraph 2 of Article 7 is applicable to the circumstances of this case (…)".

4ECtHR, Larionovs and Tess v. Latvia of 3 December 2002, pag. 7, "(…) les deux paragraphes constituent ainsi un système uni et doivent faire l'objet d'une interprétation concordante (…)". Kononov v. Latvia of 17 May 2010, par. 186 is afirmed that: "(…) the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner (...)".

5ECtHR, Maktouf and Damjanović v. Bosnia Herzegovina of 18 July 2013,m par. 72: "(…) article 7 § 2 is only a contextual clarification of the liability limb of that rule, included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed during that war (…)". See also the case: Vasiliauskas v. Lithuania of 20 October 2015, par. 188.

of the preceptive force of the Nuremberg clause and as an application spectrum of Art. 7, par. 2 (South, 2021).

Self-restraint takes the form of a natural epilogue and a reason for extending the prediction, as a need for substantial justice and as a potential extension applied to crimes against humanity[6]. It is abstract in its relevance to war crimes that are committed during World War II by allied forces and not by the Nazis[7]. The judges have made a certain delimitation which is served by par. 1 of Art. 7 ECHR[8]. Within this context, a laconic living right is investigated as a case of exceptional arguments, warranties and more.

Exceptionalism: ECtHR and the inspirational ratio

The inspiring rationale of the Nuremberg clause was based on the application of the exception of Nazi war crimes to a model of criminal prosecution that must be repressed by domestic courts by virtue of retroactive indictments. These are decisions of inadmissibility of the appeals where the referral to the preparatory works are conventional justifications relating to the

6ECtHR, Papon v. France of 15 November 2001; Touvier v. France of 13 January 1997.

7ECtHR, Kononov v. Latvia of 17 May 2010.

8ECtHR, Streletz, Kessler, Krenz v. Germany of 22 March 2001; K.-H. W. v. Germany of 22 March 2001; Kolk and Kislyiy v. Estonia of 17 January 2006; Penart v. Estonia of 24 January 2006; Jorgic v. Germany of 12 July 2007; Korbely v. Hungary of 19 September 2008; Ould Dah v. France of 17 March 2009; Vasiliauskas v. Lithuania of 20 October 2015; Maktouf and Damjanović v. Bosnia Herzegovina of 18 July 2013; Linkov v. The Czech Republic of 7 December 2006; Naletilić v. Croatia of 4 May 2000.

ex post facto punishment, constant by the judges in an exhaustive way[9].

Within this context we recall the B. v. Belgium case where Art. 7, par. 2 is used indirectly as legitimization of the application of Art. 9 of the Belgian law of 9 August of 1948. It was introduced subsequently to the tempus delicti and as a title of further criminal consequences where the loss of the right to a pension had already been condemned[10].

We see the same road of modus proceeded in the X v. Norway and X. v. Belgium cases. In the first case we have a previous decision that dates back to the regulatory act of 1942 where the government in exile criminalized the membership of the Union Nation and the Nazi party headed by Hitler[11]. Instead in the X v. Belgium case the retroactive conviction of a Belgian soldier for activities carried out in the German army during the Belgian occupation is confirmed[12].

Equally important is the De Becker v. Belgium case. This is a typical case of collaboration with the editor-in-chief being sentenced to 17 years in prison based on Art. 123 of the Belgian penal code. For the judges, the appeal and the violation of Art. 7 ECHR despite retroactivity were inadmissible. The second paragraph of the same art. 7 excludes from the guarantee acts

9ECtHR, B. v. Belgium of 20 July 1957, par. 24.
10ECtHR, X. v. Belgium of 18 September 1961.
11ECtHR, X. v. Norway of 30 May 1961.
12ECtHR, X. v. Norway of 30 May 1961.

which, at the time they were committed, were criminal according to the general principles of law recognized by civilized nations, and the Commission considers these acts of collaboration[13]. The exceptional nature is now problematic and turns out to have a physiological nature.

(Follows): The Touvier and Papon cases

The Touvier[14] and Papon[15] cases are disputes that arise from the French legal system. These are cases of inadmissibility with respect to the commission and the ECtHR (Bassiouni, 2011; Atadjanov, 2019; Berlin, 2020; Pons, Lord, Stein, 2022). The action of the exception as well as the silence of the preparatory works ended up as a basis and consequence of the crimes against humanity. Touvier was a leader in the French militia during the German occupation of Rhône and was tried for the execution of 7 civilian Jews in Rillieux-Le-Pape (June 29, 1944) and after the related murder of the minister Philippe Henriot who was part of the resistance forces.

With regard to liability, the national courts questioned some precise profiles:

13ECtHR, De Becker v. Belgium of 9 June 1958. According to Pelloux: "(…) le second alinéa du même article 7 place en dehors de la garantie les actes qui, au moment où ils ont été commis, étaient criminels d'après les principes généraux de droit reconnus par les nations civilisées, et la Commission considère comme tels les faits de collaboration (…)".

14ECtHR, Touvier v. France of 13 January 1997.

15ECtHR, Papon v. France of 15 November 2001.

"(...) the sub-summability of the facts within the category of crimes against humanity and the limitation regime, governed by the single article of Law no. 64-1326 of 26 December 1964 (…)".

Crimes against humanity, as defined by the United Nations resolution of 1 February 1946, and contained in the Charter of the International Tribunal of 8 August 1945. These are imprescriptible by their nature. Therefore, the Court of Appeal of Paris in 13 April 1992 affirmed that:

"(...) the common disputed crimes, since in the previous case law had been qualified as "crimes contre l'humanité" the conduct directed against the opponents of a policy of ideological hegemony (…), requirement that the pro-Nazi government of Vichy, of which Touvier was an exponent, did not possess (…)" (Pinto, 1992)[16].

The court of Cassation reversed the decision on the assumption that the facts charged were found in crimes against humanity and are imprescriptible. Thus the sentence was final and the same rejected reasons are proposed, only that the outcome did not change.

The Strasbourg judges:

"(...) consider the French law on imprescriptibility merely declarative (...) and without proceeding with any requalification, verify whether the application spectrum of par. 2 also includes the category of crimes in question (...)".

Par. 2 of art. 7 aims to clarify that the article does not affect the laws which, in the absolutely exceptional circumstances that occurred at the end of the Second World War, were passed to repress war crimes and acts of treason and collaboration with the enemy. It does not intend to condemn them either juridically nor morally believing that this reasoning is equally valid for crimes

16Court of Appeal of Paris in sentence of 13 April 1992, in Gazzette du Palais, 1992, 1, 387ss.

against humanity[17].

We can speak of a cauda venenum of an exceptional nature given that the Nuremberg clause carried out a questionable operation without giving reasons and oriented towards an extensive interpretation which conceived a term of analogy in malis because it did not clarify the relative elements of affinity connected with the crimes against humanity and as possible meanings of war crimes. In the system of ECHR the lack of a prohibition as a result in malam partem is presented as a perspective angle of Art. 7, par. 1 which restricts the pre-established rights protected by the ECHR.

We also encounter the same system in the Papon case, an official of the Vichy government condemned by the national courts for complicity in the arrests, for arbitrary kidnappings, completed and attempted murders, as well as the deportations to Auschwitz of many Jews. According to the court:

"(...) the legitimacy of such conduct was attributable to the category of crimes against humanity; therefore, for the purposes of liability by way of competition, neither adherence to the policy of ideological hegemony of the main perpetrator (as the Cassation had finally clarified in the Touvier case), nor membership of an organization declared outlawed would not have been required (…)"[18].

It is an unpredictable revirement in malam partem in the ECtHR stating that:

"(...) par. 2 of article 7 (…) does not invalidate the sentence and punishment of the guilty of an act or omission, which at the time it was committed, was

17ECtHR, Touvier v. France of 13 January 1997.
18ECtHR, Touvier v. France of 13 January 1997.

criminal according to the general principles of law recognized by civilized nations, which happens for crimes against humanity. The imprescriptibility was enshrined in the Statute of the International Tribunal of Nuremberg and annexed to the inter-allied agreement of 8 August 1945 and by a French law of 26 December 1964, which expressly refers to crimes against humanity that are imprescriptible (...)"[19].

We have to do with clear, pure deficits in this case too.

The Naletilič and Linkov cases: Towards a generalized exception

The Naletilich v. Croatia[20] and Linkov v. The Czech Republic of 7 December 2006[21] cases present themselves with critical way, especially because the Nuremberg clause is referred to them in an implicit way. Naletilič, a Croatian citizen already convicted of violations of the Geneva Convention both at national level and the ICTY arrived at the ECtHR for infringement of Art. 6, par. 1 ECHR given the risk of applying a very long and severe sentence because the Croatian court could not impose life imprisonment according to the Statute of the ICTY, i.e. a type of imprisonment not exceeding 20 years. We are talking about a violation of the principle of legality where the judges stated that:

"(...) assuming that art. 7 should apply to the concrete case, the specific provision to come into relief would be par. 2 and not the first (…). The second sentence of par. 1 relied on by the appellant cannot apply (…). It is equivalent, on the one hand, to attributing to the general principles of law recognized by civilized nations the ability to determine the disciplinary treatment and, on the other, to radically exclude the applicability of a lex

19ECtHR, Papon v. France of 15 November 2001, par. 7.
20ECtHR, Naletilić v. Croatia of 4 May 2000, par. 2.
21ECtHR, Linkov v. The Czech Republic of 7 December 2006.

mitior, without adequately motivating the point (...)"[22].

In the Linkov case the Court affirmed the violation of Art. 11 ECHR relating to freedom of assembly and association[23]. It is an element that goes far from the imprescriptibility and retroactive punishment of crimes according to the constitution and integrity of the state[24]. Within this context, the ECtHR states that:

"(...) judging the restriction imposed by the domestic authorities disproportionate, although it aimed to guarantee (...) the nullum crimen".

The reason still rests in Art. 7 par. 2 which, according to the words of the judges, is aimed at introducing an exception to the principle of non-retroactivity, since situations may arise in which a state legislator is forced to resort to a retroactive criminal law. The reasoning, according to the authors of the Convention, was not exclusively valid for war crimes committed during the Second World War and for crimes against humanity[25].

In this case we note a certain extension of the application of art. 2 in the crimes against humanity that took place in via pretoria and according to a literal interpretation of the preparatory works where the range of action of the Nuremberg clause is expanded not only in space but also in time, including the facts committed even after the second war world. Therefore the court stated that:

"(...) not having to pronounce on any parallelism between what happened in Europe during the Second World War and the events that occurred in the

22ECtHR, Naletilić v. Croatia of 4 May 2000, par. 2.
23ECtHR, Linkov v. The Czech Republic of 7 December 2006, par. 6.
24ECtHR, Linkov v. The Czech Republic of 7 December 2006, par. 7, 9-10.
25ECtHR, Linkov v. The Czech Republic of 7 December 2006, par. 41.

territory of the ancient Czechoslovakia of 1948-1989 it limits itself to highlighting how the political transition and the condemnation of the communist regime, pursuant to national laws n. 480/1991 and no. 198/1993, allow us to consider the aims of the Liberal Party to be established as compatible with "the democratic rules" and with the "sense of the exception provided for by art.7, par. 2 (...)"[26].

The Naletilič and Linkov cases are representative of a plasticity of the short-circuit effect where the Nuremberg clause has incorporated objects and periods of its ratio. It is outlining a picture of a provision where the profile of individual guarantees has a ductile nature, i.e. of an exploited, uncertain and why not cumbersome nature.

Guarantee and generalization. An intermediate road

Do all kinds of perpetrators of this kind of crime come to terms? (Gil Gil, 2010).

There is an international strength of the principle of legality whereby the contractual and customary consolidation of the crimina iuris gentium can leave the judgments of Strasbourg without concrete words. As a consequence we have the abandonment of par. 2, thus reinvigorating international law in a perspective where the appeals are nothing more than of an inadmissible nature examined on the merits. The jurisprudence of the ECtHR ended up at an intermediate road since it was called upon to decide on conventional compatibility and the sentences imposed for international crimes after the collapse of

26ECtHR, Linkov v. The Czech Republic of 7 December 2006, par. 42.

the pro-Soviet communist regimes. Thus the ECtHR used a decision parameter for the generalization of the Nuremberg clause starting from the argument under international law. Within this context we refer to the Kolk and Kislyiy v. Estonia (Cassese, 2006; MacNeil, 2021)[27] and Penart v. Estonia[28] cases in relation to crimes against humanity.

In the Kolk-Kislyiy and Penart v. Estonia case both were high officials in the state that contributed to the deportation of civilian population of Estonia during the occupation of the Soviet Union during March of 1949. They are convicted by the Tallinn Appeal Court according to Art. 61, par. 1 of the criminal code of 1994[29] for related crimes against humanity, in 2004. The appellants appealed to the ECtHR for violation of Art. 7 ECHR arguing that crimes against humanity were not foreseen by the Soviet penal code which was applicable only in Estonian territory and during the facts, i.e. only in 1994 and not before.

The related conduct was not carried out during the Second World War or in connection with war crimes or crimes against

27ECtHR, Kolk and Kislyiy v. Estonia of 17 January 2006.

28ECtHR, Penart v. Estonia of 24 January 2006.

29ECtHR, Kolk and Kislyiy v. Estonia of 17 January 2006, par. 4: "(...) crimes against humanity, including genocide, as defined in international law, namely, the voluntary commission carried out with the aim of exterminating in whole or in part a national, ethnic, racial or religious group, a group resistant to an occupation regime or another social group, killing or inflicting extremely severe physical or mental suffering on, acts of torture on a member of such a group, kidnapping of children, armed attack, the deportation or expulsion of the native population in the event of occupation or annexation and the economic, political or social deprivations or restrictions of human rights, are punished with imprisonment from 8 to 15 years or with life imprisonment (…)".

peace but fell within the jurisprudence of the Tribunal of Nuremberg and of the International Military Tribunal (IMT). They are not qualified as crimes against humanity according to international law but based on acts where the Soviet legal system were legitimate but did not allow for future condemnation. Thus the judges of the ECtHR stated that:

"(…) due to the Soviet occupation, Estonia had not been able to fulfill its international commitments; reason why the Convention on the imprescriptibility of war crimes and crimes against humanity was signed only on 21 October 1991 and the penal code amended on 9 December 1994 (…). The deportation and murder of civilians were expressly contemplated as crimes against humanity by Art. 6(c) St. IMT of Nuremberg (…). This article had been established to punish the main war criminals of the Axis countries for acts committed before or during the war, the principles contained therein have "universal validity"[30], as demonstrated, e.g., by Resolution n. 95 of the United Nations General Assembly of 11 December 1946 and, subsequently, by the International Law Commission (…). Responsibility for crimes against humanity cannot be limited only to the citizens of certain countries and only to acts committed in the specific temporal context of the Second World War (...)[31]. Article I (b) of the Convention on the non-prescriptibility of war crimes and crimes against humanity (to which Estonia has bound itself, assuming the obligation to implement its provisions within its legal system) provides that crimes against humanity are not prescribed, regardless of the date of their commission and the circumstance that they were made in time of war or in time of peace (...)[32]. Art. 7 par. 2 of the Convention expressly provides that this shall be without prejudice to the prosecution and punishment of any person for any act or omission which, at the time it was committed, constituted a criminal offense under the general principles of law recognized by civilized nations (…) is true for crimes against humanity, with respect to which the imprescriptibility was sanctioned by the Nuremberg Statute (...)"[33].

30ECtHR, Kolk and Kislyiy v. Estonia of 17 January 2006, par. 8.

31ECtHR, Kolk and Kislyiy v. Estonia of 17 January 2006, par. 9.

32ECtHR, Kolk and Kislyiy v. Estonia of 17 January 2006, par. 9.

33ECtHR, Kolk and Kislyiy v. Estonia of 17 January 2006, par. 9; Penart v. Estonia of 24 January 2006, par. 9: "(…) the Court reiterates that Article 7 par. 2 of the Convention expressly provides that this Article shall not prejudice the trial and punishment of a person for any act or omission which, at the time it was committed,

The novelties relating to the decisions did not have an ad excludendum nature but only ad colorandum which set aside the Nuremberg clause some conduct that was lawful under Soviet law and prohibited by international law in force at the time of its implementation. Already in 1949 there was no general principle whereby the law of civilized nations forbade crimes against humanity and contemplated by the related treaties, i.e. the Nuremberg Charter and in a customary way the relationship with conventional legality and crimina iuris gentium is on the way to a decisive turning point towards a more guaranteed path.

Towards guarantee

The ECtHR has tried to bypass the Norimebrga clause by adding international crimes in ex art. 7, par. 1 and explaining them as a principle of accessibility and predictability, as qualitative elements considered indefeasible for the internal law of the ECHR.

It is a new methodology based on the motto: "it must be possible to have", and where

"(...) adequate information, based on the circumstances of the case, on the applicable law (accessibility) (...)".

It is only a rule stated with such precision as to allow the citizen to regulate his own conduct i.e. possibly making recourse to

was criminal according to the general principles of law recognised by civilised nations. This is true of crimes against humanity, in respect of which the rule that they cannot be time-barred was laid down by the Charter of the Nuremberg International Tribunal (...)".

clarifying advice. This must have the possibility of foreseeing, with a reasonable degree of approximation in relation to the circumstances of the case, the consequences that may arise from a given act (foreseeability)[34]. Such a technique goes towards the intelligibility and rationality of the decisum as a knock-down argument which prevents any kind of argumentation. Anything happened in the event of an exceptional nature such as the argumentation clause and the conversation stopper function.

The clarity and the motivation of the knowability of the prohibition of an international nature to the tempus delicti is a national incriminating norm that is introduced after trying to create a virtuous circle between

"(...) moments of guarantee expressed by the set of fundamental principles of the matter (…)".

In fact, the intellectual bond between fact and author, according to Sud Fondi srl et al. v. Italy case has been explained by Art. 7 ECHR[35].

It is a conventional approach to the international nullum crimen which contributes the fundamental right to a just and more concrete punishment which renounces lato sensu to prevent the conviction of Art. 7, par. 2 ECHR relating to functional obsolescence. To make this system functional and in practice, the criteria used to verify the relative qualitative requirements must be appropriate. Qualitative requisites that tend to be

34ECtHR, Sunday Times v. The United Kingdom of 26 April 1979, par. 49.
35ECtHR, Sud Fondi srl. and others v. Italy of 20 January 2009.

inelastic are needed where case law often reveals satisfied conditions to be resolved and where the Court makes use of regulatory parameters, i.e. treaties, obligations of states and not to the criminal liability of individuals (Mariniello, 2013)[36]. The jurisprudential change in malam partem is only an unreasonably unpredictable measure where the judges of Strasbourg state:

"(...) in the ontological basis of the judgment of predictability".

Alongside juridical-normative variables are included very vague and elusive socio-political and cultural elements (parliamentary initiatives and debates, cultural progress, evolution of social consciousness) of a subjective nature. It is therefore understandable why the declared compliance with the rule pursuant to Art. 7, par. 1 ECHR. (sub species of predictability) very often ends up ratifying phenomena of hidden retroactivity (Mariniello, 2013).

The Streletz, Kessler, Krenz v. Germany and K.-H.W v. Germany cases. New screening tests

The Streletz, Kessler, Krenz and K.-H.W cases (Miller, 2001; Juratowitch, 2005, Grover, 2010) are related to the trials for the murders that are committed at the Berlin Wall, after the reunification of Germany.

Given that the crimes committed are before 2001, are considered

36ECtHR, Kononov v. Latvia of 17 May 2010; Streletz, Kessler, Krenz v. Germany of 22 March 2001; K.-H. W. v. Germany of 22 March 2001.

to be included in the transition from the exceptional to the guaranteed methodology[37]. Article 7, par. 1 is justified in the reservation advanced by the German government and the ratification of the Convention (13 November1952), par. 2. In compliance with Art. 64 of the Convention, the Federal Republic of Germany reserves the right to apply only the provision pursuant to art. 7 par. 2 within the limits of Art. 103 par. 2 of the Constitution. It establishes that a conduct is punishable only if it is foreseen by law as a crime before its commission[38]. So, in this case the Nuremberg clause has an imposed and temporary nature.

In Ergon Krentz case (last president of the Deutsche Demokratische Republik (DDR or RDT)), Fritz Streletz and Heinz Kessler, senior officers of the National Defense Council were convicted as mediators for the killing of some fugitives between 1984 and 1989. K.-H.W. was in the military, guilty of the murder committed at the border on the night between 14 and 15 February 1972. The facts are based on Art. 27 of the "Gesetz über die Staatsgrenze der Deutschen Demokratischen Rupublik (Grenzgesetz)" of 25 March 1982. The provision ruled against the use of firearms in relation to:

"(...) the imminent perpetration or prosecution of a crime that occurs, depending on the circumstances, as a crime (Verbrechen) (lett. 1)".

37ECtHR, Kononov v. Latvia of 17 May 2010; Larionovs and Tess v. Latvia of 3 December 2002.

38ECtHR, K.-H. W. v. Germany of 22 March 2001.

Par. 213 StGB DDR has punished the illegal border crossing (Ungesetzlicher Grenzübertritt) and, murders should not be considered unlawful[39].

The case just mentioned took into consideration the extremes of the "Verbrechen" where the use of weapons was lawful only in the most serious cases and as foreseen:

"(...) in the illicit passage with a firearms license and with dangerous means or methods, in the commission of the fact, with a particular intensity or together with other people, etc. (...) and certainly not in the event that civilians were unarmed (...)".

Government practice required opening fire (Schiessbefehl), decorating in such a way the most "diligent" soldiers and not initiating criminal proceedings[40]. The exercise of the punitive magisterium after the unification has violated inter alia[41], the relative prohibition of non-retroactivity which is sanctioned by Art. 7 ECHR. ECtHR replied in the negative, motivating itself not on par. 1, affirming that:

"(...) the governmental practice is deemed unsuccessful with respect to human dignity (protected by Art. 19 Grundgesetz), as moreover demonstrated by the fact that par. 213 StGB DRR and par. 27 Grenzgesetz indicated the use of violence as an ultima ratio, imposing the safeguarding of life (…). The two events are apparently distinct in terms of predictability (…). They had implemented and supported that regime (...) by making secret orders and service instructions prevail over written law, published in the Official Gazette, for the consolidation and improvement of the protection mechanisms of the border and for the use of weapons (...)"[42].

Obeying the superior order at all costs as happened in the K.-H.W case, means running the risk of being subjected to an

39ECtHR, K.-H. W. v. Germany of 22 March 2001.
40ECtHR, K.-H. W. v. Germany of 22 March 2001, par. 13.
41ECtHR, K.-H. W. v. Germany of 22 March 2001.
42ECtHR, Streletz, Kessler, Krenz v. Germany of 22 March 2001, par. 78.

investigation where someone was able to cross the border[43]. This position makes the official legislative texts and the penal code and the constitution intelligible under the principle of ignorantia legis non excusat[44]:

"(…) it is legitimate for a rule of law to try those who committed crimes under the previous regime; similarly, the Courts of the successor state cannot be criticized for having applied and interpreted the provisions in force (...) in the light (...) to the rule of law (...)[45], especially since judicial shift is an element that cannot be eliminated even when the provisions are clearly formulated (…). That practice, which essentially deprived the legislation on which it should have been based and which was imposed on all organs of the GDR, including the judiciary, cannot be considered "law" (...)"[46].

From a political point of view, the cases under investigation put a definitive stone on a long duration of more than a decade which move in continuity with the national jurisprudence and with different arguments, diversifying the sanctioning treatment of the different intensities of the criminal contributions.

The punishability of conduct involving alternation between states produces an element of surprise for senior officials according to practice where without a doubt is contra legem and could not guarantee, reassure a young soldier that he is the master of a regime. The judges have gone beyond the limits of the unreal given that domestic law provides a favorable response to the applicant by appealing to international sources. The

43ECtHR, K.-H. W. v. Germany of 22 March 2001, par. 71.

44ECtHR, K.-H. W. v. Germany of 22 March 2001, parr. 73 and 75.

45ECtHR, Streletz, Kessler, Krenz v. Germany of 22 March 2001, par. 81; K.-H. W. v. Germany of 22 March 2001, par. 84.

46ECtHR, Streletz, Kessler, Krenz v. Germany of 22 March 2001, par. 87; K.-H. W. v. Germany of 22 March 2001, par. 90.

reference to international law in this case performs a different function, i.e. the prohibition of retroactivity as a subjective teleological component where in the case of violation it can be declared when the chief perpetrator is aware of his own lawfulness and convinced of not be punished. The individual was thus theoretically able to know the existence of the relative insurmountable juridical prohibitions which are placed by international norms for the protection of human rights where the application of a penalty is conventionally compliant.

The Larionovs and Tess v. Latvia case. More investigative evidence

The Larionovs and Tess v. Latvia case is part of the beginning of a turn that is based on par. 2 of Art. 7 ECHR. Avoiding conceptual misunderstandings, the Nuremberg clause is a real generalized exception to the prohibition of retroactivity which becomes a simple tool for declaring the principle of non-retroactivity in a general way as a derogation that cannot be admitted according to par. 2, but in a limited field of action and included in the retroactive national legislation which is adopted after the Second World War. The exception here holds in the relevant case of the National Socialist experience or as the judges called it "dérogation exceptionnelle",

"(…) un système uni [qui] doi[t] faire l'objet d'une interprétation

concordante (...)"[47].

And within this system of meaning of a stipulative nature we can speak of a precise function of the Nuremberg clause which is concluded with the declaration of inadmissibility of the failure to exhaust the internal remedies without presenting profiles of interest that linger on the facts of the case.

(Follows) The Kononov v. Latvia case

The Kononov v. Latvia is a case that falls within the guarantee period (Pinzauti, 2008)[48]. The facts originating from May 1944 and ascribed by the Supreme Court to the category of war crimes fell within ex Art. 68, par. 3 of the Criminal Code that was introduced introduced in 1993. It is referred to the relevant international legal conventions, the 1949 Geneva Convention on the protection of civilians in time of war, Art. 25 Hague Regulation of 1907 and Art. 23 b of the Hague Regulation of 1907 establishing the violation of the principle of non-retroactivity. The Grand Chamber, on the other hand, "reforms" the sentence of first instance, arguing that at the tempus delicti war crimes were sufficiently defined by international law. The Strasbourg judges decided (not unanimously) on the qualification of the victims, civilians or combatants; the identification of the international legal basis of the sentence and

47ECtHR, Larionovs and Tess v. Latvia of 3 December 2002, par. 7.

48ECtHR, Kononov v. Lativa of 24 July 2008 and Kononov v. Latvia of 17 May 2010.

the accessibility and predictability.

According to the ECtHR:

"(...) it contains a presumption by virtue of which whoever does not belong (or there is a doubt belongs) to one of the categories of combatants indicated in Art. 4 letter. a), no. 1, 2, 3 and 6 must be considered a civilian (Van Dijk, 2022)[49], nevertheless the provision was adopted thirty years after the facts of the case and cannot be applied retroactively. Furthermore, the fact that the Geneva Conventions of 1949 did not contain one of the same tenor suggests the absence of a customary rule (…). There is nothing to demonstrate that, pursuant to the jus in bello in force in 1944, an individual not formally ascribable to the status of combatant was automatically to be attributed to the category of civilians and could enjoy the relative guarantees (...)"[50].

In the same spirit we have seen the Milanković v. Croatia case of 20 January 2022[51].

49Art. 4 lett. a) of the Third Geneva Convention of 12 August 1944 reads: "(…) are prisoners of war, within the meaning of this Convention; persons who, belonging to one of the following categories, have fallen into enemy power: 1) members of the armed forces of a Party to the conflict, as well as members of militias and volunteer corps forming part of these armed forces (…) ; 2) members of other militias and other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating outside or within their territory, even if this territory is occupied, provided that these militias or volunteer corps, including the so-called organized resistance movements, fulfill the following conditions: a person responsible for their subordinates; b. wear a fixed distinctive sign recognizable from a distance; c. carry weapons openly; d. comply, in their operations, with the today and to the uses of war (…) ; (3) members of the regular armed forces employed by or under authority not recognized by the Detaining Power (...); 6) the population of an unoccupied territory who, on the approach of the enemy, spontaneously take up arms to fight the invading troops without having had time to organize themselves into a regular armed force, provided they openly bear arms and observe the laws and the customs of war (…)".

50ECtHR, Kononov v. Latvia of 17 May 2010, par. 131.

51Artt. 86 and 87 of the relevant Articles of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977. ECtHR, Milanković v. Croatis of 20 Ianuary 2022, parr. 62-64. In particular the ECtHR declared that: "(…) the Court first reiterates that the scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed (see Kononov, cited above, par. 235). It furthermore reaffirms that, in the context of a commanding officer and the laws and customs of war, the concepts of accessibility and foreseeability must be considered together (…). In this light the Court affirms the ICTY's position in Hadžihasanović and Others that, in cases such as the present one, foreseeability

It is a case of a preliminary ruling given that the victims qualifying as combatants for the possession of weapons supplied by the German army present the appeal without application of art. 7, par. 2.

"(…) The operation of 27 May 1944 could not be considered criminal according to the general principles recognized by civilized nations (...)"[52].

In the Grand Chamber, the judges

"(...) classify the victims alternatively, i.e. combatants or civilians, those who have participated in hostilities (for having transmitted information to the German military administration), valuing the circumstance (...) that themselves at the time of the attack were not carrying weapons (that is, they were "at rest", hors de combat) (...) that they would have been entitled to humane treatment (and not to summary execution)[53] (…) and in the light of the customary law, could have been attacked only as long as active parties in the fighting (...)"[54].

ECtHR considered two issues that remained to absorb the previous judgement. The legal basis of the conviction is reconstructed through various sources which integrate the details of an international custom which sanctions individual penal responsibility for war crimes at the tempus delicti[55]. Within this context, the Lieber Code of 1863 was considered as the first

means that the accused must be able to appreciate that his conduct is criminal in the sense generally understood, without reference to any specific provision, and that accessibility does not exclude reliance being placed on a law which is based on custom (…) Having regard to the flagrant unlawful nature of the war crimes committed by the police units under his command, the Court considers that even the most cursory reflection by the applicant would have indicated that, at the very least, the impugned omissions on his part risked involving command responsibility regardless whether those crimes were committed during international or internal conflict or by a military or non-military (police) commander (compare Kononov, cited above, § 238, and Šimšić v. Bosnia and Herzegovina (dec.), par. 24, 10 April 2012) (…)".

52ECtHR, Kononov v. Latvia of 17 May 2010, par. 147.

53ECtHR, Kononov v. Latvia of 17 May 2010, par. 202.

54ECtHR, Kononov v. Latvia of 17 May 2010, par. 203.

55ECtHR, Kononov v. Latvia of 17 May 2010, par. 207.

attempt to codify the laws and customs of war. It was only applicable to American forces and influenced subsequent codifications[56]. With regard to the principle of accessibility and predictability, the Grand Chamber has highlighted that they must proceed with a high standard of caution and take, where appropriate, specific measures to govern the risks[57]. The elements examined are based on international human rights protection instruments specifying the irrelevance, i.e. the failure of the military penal code to refer to international law and the failure to publish Russia, and the Latvian Socialist Republic of the related laws and customs of war[58].

The final sentence had some reservations given that it did not evaluate the legal basis with regard to sources subsequent to the commission of the disputed fact and not pertaining to individual criminal liability as a production of obligations on the part of states[59]. The connection between subjective qualification and foreseeability seems to automatically leave the court with a punctual domestic system with normative references that does not investigate the completeness of the relative military training. Thus the Nuremberg clause is abandoned given that:

"(...) the two paragraphs of art. 7 are interconnected and must be interpreted in a concordant way (…). The purpose of the second paragraph of art. 7 was to specify that the latter does not invalidate the laws which, in the absolutely

56ECtHR, Kononov v. Latvia of 17 May 2010, par. 63.
57ECtHR, Kononov v. Latvia of 17 May 2010, par. 235.
58ECtHR, Kononov v. Latvia of 17 May 2010, par. 236.
59ECtHR, Kononov v. Latvia of 17 May 2010, par. 210.

exceptional circumstances at the end of the Second World War, were passed to punish, inter alia, war crimes; crimes which, as clarified by Art. 6 (b) St. Nuremberg, were already covered by customary law (...)"[60].

The Korbely v. Hungary case

In the Korbely v. Hungary case of 19 September 2008 the ECtHR ruled once again for crimes against humanity but this time in Hungarian territory. Those crimes date back to October 1956[61].

In particular, the army officer János Korbely ordered his men to open fire on a group of armed rebels who had taken the police station in Tata. The trial process was very long[62], and in the end the Hungarian Supreme Court

"(...) condemned him for crimes against humanity, pursuant to Art. 3.1 of the IV Geneva Convention on the protection of civilians in time of war (12 August 1949) (...)"[63].

According to the ECtHR, the violation of Art. 7, par. 1 ECHR did not provide for the accountability of its acts which are related to crimes against humanity and international law. The judges of Strasbourg affirm that:

"(...) since they are subsequent to the facts of the case, neither of the two sources can be used, highlighting that the Law of Geneva does indeed provide for rules of conduct, but does not expressly qualify them as crimes against humanity[64] (...) provided, however, that further elements that were present, omitted by the Geneva Conventions. The existence of a war nexus (i.e., a link between fact and hostility) and the traceability of the conduct to the policy of a state or to a systematic or large-scale attack against the

60ECtHR, Kononov v. Latvia of 17 May 2010, par. 186.
61ECtHR, Korbely v. Hungary of 19 September 2008, par. 48.
62ECtHR, Korbely v. Hungary of 19 September 2008, parr. 9 and 48.
63ECtHR, Korbely v. Hungary of 19 September 2008, par. 21.
64ECtHR, Korbely v. Hungary of 19 September 2008, parr. 79-80.

civilian population[65] have lost relevance in 1956 (...)"[66].

The Grand Chamber with its order dwelled on the relative interpretation of the status of the rebel leaders and respected the position of the domestic investigation which was concentrated. Therefore that Tamás Kaszás has not been considered as non-combatant, was an important expression that has not been emerged in a precise and unequivocal way according to the decisive will for the purposes of framing the protected category of Art. 3 of the Geneva Conventions[67]. So Art. 7, par. 1 ECHR was essentially not criminalized under international law. Moreover, the ECtHR itself stated that:

"(...) the behavior in question could not be considered criminal even on the basis of the general principles recognized by civilized nations (...) because the functional obsolescence of § 2 is now full-blown (…)".

The Ould Dah v. France case

We continue with the same interpretative path in the Ould Dah v. France case[68], where in 1999 a Mauritanian army officer was arrested in Montepellier for crimes committed (acts of torture) in his own country during clashes between citizens of Arab-Berber origin and population belonging to African ethnic groups. Ely Ould Dah in 2005 was definitively sentenced according to the former Art. 222-1 of the Criminal Code and Articles 689-1 and 689-2 of the Code of Procedure. They implemented the principle

65ECtHR, Korbely v. Hungary of 19 September 2008, parr. 80-84.
66ECtHR, Korbely v. Hungary of 19 September 2008, par. 82.
67ECtHR, Korbely v. Hungary of 19 September 2008, parr. 90-91.
68ECtHR, Ould Dah v. France of 17 March 2009.

of universal jurisdiction on the basis of the international conventions referred to in the following articles. Specifically, they argued that whoever is guilty of having committed one of the crimes listed in these provisions outside the territory of the Republic and is in France can be tried and convicted by the French courts. The provisions of this article will also apply to the attempted case, if the attempt is punishable[69]. The implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted in New York. So, anyone who commits acts of torture pursuant to Art. 1 of the Convention can be tried and punished by virtue of art. 689-13[70].

Before the ECtHR, the appellant complained that Art. 222-1 of the Penal Code had entered into force four years after the commission of the facts. Torture was qualified by the previous code as a special aggravating circumstance. Finally, he considered it impossible for French law to prevail over Mauritanian law, which had granted amnesty for those crimes. The ECtHR highlighted that the prohibition of torture has taken into consideration numerous international instruments while remaining faithful to mandatory and jus cogens norms. A sensitive process, perhaps incomplete, but even here the test of accessibility and predictability was considered, where the

69ECtHR, Ould Dah v. France of 17 March 2009, parr. 16-17 and 126-127.
70ECtHR, Ould Dah v. France of 17 March 2009, parr. 126.

qualification of torture as an aggravating circumstance and as an autonomous crime does not result in dissolving given that the French legislator has moved within the continuity and extension of the indictment as implemented in art. 221-1 attributing criminal relevance also to further cases. Therefore the applicant could reasonably have foreseen the risk of being tried and convicted[71]. Consequently, many problems have emerged as to the fluid meaning of continuity and foreseeability of a normative nature but also from the fact that the judges do not examine whether the punishment of the sentence is justified or not by the Nuremberg clause[72].

The Maktouf and Damjanovic v. Bosnia Herzegovina case

In the present case the ECtHR had to judge on the relative application of the sanctioning treatment[73]. The Iraqi Abduladhim Maktouf and the Bosnian Goran Damjanovic were convicted of war crimes. The first to five years' imprisonment for having facilitated the kidnapping of two civilians, with the aim of exchanging them for some members of the army of the Republic of Bosnia-Herzegovina (taking of hostages)[74]. The second to eleven years' imprisonment for carrying out a three-

71ECtHR, Ould Dah v. France of 17 March 2009, parr. 128.

72ECtHR, Ould Dah v. France of 17 March 2009, parr. 18 and 19.

73ECtHR, Maktouf and Damjanović v. Bosnia Herzegovina of 18 July 2013, par. 10.

74ECtHR, Maktouf and Damjanović v. Bosnia Herzegovina of 18 July 2013, par. 11.

hour beating of some prisoners (torture)[75].

The tempus delicti code provided for a maximum of 15 years of imprisonment therefore the convicts complained according to the Bosnian penal code of 2003 and not according to the current one of the facts i.e. the previous code of 1976. The tempus iudicii code

"(...) contemplated a penalty frame of between ten and twenty years of imprisonment (which, in the most serious cases, became twenty and forty-five), reducible up to five years in cases of complicity. If the national judge had applied the 1976 code, the less seriousness of their conduct (...) would have led to the imposition of lower penalties (...) both codes are to be applied. In general, the state court applies the previous sanctioning treatment for less serious situations and the current code for the more serious ones. The guiding criterion in these hypotheses is provided by the more lenient law in practice. It cannot be said with certainty that both applicants would have received a lesser sentence if the previous code had been applied. In any case, the fact that they could have had it (...) is decisive (...) consequently, since there is the concrete possibility that the retroactive application of the 2003 code worked to their disadvantage, it cannot be said that they had an effective guarantee against the application of a more serious penalty, in violation of Art. 7 of the Convention (...)"[76].

Here, the principle of legality has been violated since the retorts of the argument put forward are resistant. Thus the ECtHR stated that:

"(…) recalling the Naletilić case, Art. 7 par. 2 of the Convention provides an exception to the rule of non-retroactivity of offenses and penalties enshrined in par. 1. In other words, if a fact was criminally relevant both by the general principles of law recognized by civilized nations and by national law, then a more serious penalty could be imposed than the one applicable by virtue of national law (...)"[77].

75ECtHR, Maktouf and Damjanović v. Bosnia Herzegovina of 18 July 2013, par. 19.

76ECtHR, Maktouf and Damjanović v. Bosnia Herzegovina of 18 July 2013, par. 70.

77ECtHR, Maktouf and Damjanović v. Bosnia Herzegovina of 18 July 2013, par. 62.

The ECtHR made no distinction respecting the precedent mentioned, i.e. the application spectrum of the second paragraph which is circumscribed according to the retroactive penal legislation which is adopted to punish the crimes committed during the Second World War[78]. In finis,

"(...) the rigidity of the principle of non-retroactivity (is) attenuated in certain historical situations, because even international humanitarian law, cited in support of this assertion, contains a prohibition of ex post facto laws (...)"[79].

The Vasiliauskas v. Latvia case

Once again the Nuremberg clause was mentioned in the Vasiliauskas v. Lithuania case (Panov, 2016; Žilinskas, 2016)[80]. Vytautas Vasiliauskas, a former agent of the Ministry of State Security of the Lithuanian Soviet Socialist Republic was convicted of participating in an extermination imposed by the Soviet repressive apparatus and with the aim of killing two partisans on 2 January1953. The indictment and the conviction are based on the crime of genocide and on Art. 2 of the law of 9 April 1992. According to them

"(…) the killing, torture and deportation of inhabitants of Lithuania committed during the occupation and annexation of Lithuania by Nazi Germany and the Soviet Union are qualified as "genocide" as defined by international law (...)"[81].

78ECtHR, Maktouf and Damjanović v. Bosnia Herzegovina of 18 July 2013, par. 72.

79ECtHR, Maktouf and Damjanović v. Bosnia Herzegovina of 18 July 2013, parr. 62 and 72.

80ECtHR, Vasiliauskas v. Lithuania of 20 October 2015, par. 50.

81ECtHR, Vasiliauskas v. Lithuania of 20 October 2015, par. 51.

The ECtHR highlighted tempus delicti as a category of political groups. It was not included in the notion of genocide but in the penal code together with that of political groups according to the relative amendment of 21 April 1998[82]. However, the principle of non-retroactivity was violated. On the other hand, the government, assuming its own responsibility, declared that the partisans were representatives of the Lithuanian nation. Its movement acquired legitimacy from the same society bringing together people of various backgrounds[83].

Within this context, the punishment was foreseeable. It has not been overlooked that customary law also contemplated political groups and the related categories of groups that are protected by them[84]. The Grand Chamber believes there is a violation of Art. 7 ECHR. The cause of the "conventionality complaint" lies in the lack of predictability of the sentence. At the time of the crime, in fact, contractual (i.e., Article 2 of the Genocide Convention) and customary law contemplated only "national, ethnic, racial and religious" groups (with the express exclusion, in the preparatory works, of political groups)[85]. They could accept an interpretation in qualitative/substantial terms of the notion of "part" in a protected group, bringing the two partisans back to it due to the "prominent" position they held. Such a

82ECtHR, Vasiliauskas v. Lithuania of 20 October 2015, par. 123.
83ECtHR, Vasiliauskas v. Lithuania of 20 October 2015, par. 132.
84ECtHR, Vasiliauskas v. Lithuania of 20 October 2015, par. 138-139.
85ECtHR, Vasiliauskas v. Lithuania of 20 October 2015, parr. 170, 175.

hermeneutical port was reached by the ad hoc criminal courts and by the ICJ fifty years after the events in question. The qualification of the partisans as representatives of the national or ethnic group of Lithuanians - carried out by the internal courts in the absence of any motivation on the meaning of "representation" - (precisely because it is not ordinary) must be considered the result of an analogical interpretation in malam partem[86].

Also in this case we did not see a unanimous majority thus showing the sensitivity, incompleteness and difficulty of the case. Above all, these difficulties are highlighted in the words of the Lithuanian judge Kūris who states:

"(...) the lack of reasoning on the notion of "representation" (thus conditioning the meaning of the decision)"[87].

The Courts examine the law from their ivory towers. They deal with human justice. There is no doubt that justice must be viewed through the lens of law. But when justice is sought through the law, one must look to the heart of the matter and not

86ECtHR, Vasiliauskas v. Lithuania of 20 October 2015, par. 174.

87See the dissenting opinion of judge Kūris, par. 4 that affirms: "(...) this case, the Court dealt with self-evident facts. It is obvious that the Lithuanian nation has not joyfully and openly embraced the occupation. It is obvious that the repressions of Lithuanians by the occupying regime took place on a massive scale. It is obvious that the partisans were in command of this resistance. It is obvious that they had, at least until the resistance was suppressed, the broadest support from the population. It is obvious that their main goal-an independent Lithuania-was also the main goal of the nation. And it is obvious that, defending independence, despite the low probability of success, the partisan movement represented the body and spirit of the Lithuanian nation. Therefore, the partisans were a substantial and emblematic part of that nation. Perhaps the national courts should have made all this explicit [emphasis in the text]? Would that have made sense in the society where the criminal case was decided? (…)".

dwell on trivialities to the point of making them decisive, even if they clearly aren't[88]. These are affirmations that also apply to the Nuremberg clause[89].

In finis, fiat iustitia ne pereat mundus is not a solution for all cases and the danger of retroactive punishments are methodologically obligatory and correct solutions for a substantial justice that concerns forms of impunity and formal justice that excessively restricts the fundamental rights of the individual. It is an evolutionary interpretation of the provisions of the ECHR in a sector where the same judges block the old and faithful inspiring road of Nuremberg. Every day the ne pereat mundus limits are not only juridical but also political in order not to direct a society towards a continuous revenge where it will also be difficult to identify crimes against humanity from other crimes.

Concluding remarks

From what we have understood so far is that the punitive model is an expression of temptation of a political nature and supported by victims who are provided with ethical legitimacy of the atrocities suffered. Every order abdicates one of the most important guarantees including the hostes humani generis. The

88See the dissenting opinion of judge Kūris in case: Vasiliauskas v. Lithuania of 20 October 2015, par. 98.

89ECtHR, Vasiliauskas v. Lithuania of 20 October 2015, parr. 188-189, with citations of cases: Kononov, Maktouf and Damjanović.

continuous conflict between politics and justice has disturbed almost all societies after the Second World War, where we are convinced that it is vanity to hope that science subordinates measures and provisions to absolute juridical precepts, which in circumstances of exceptional disturbances will always be practically guided by law alone fear, which of all feelings is the least reasoning. The Nuremberg clause was born precisely in a cultural context of "contradiction", where legality is not yet a principle of sovereignty, but a maxim of balanceable justice. The general principles of law are the means-obscure, but strongly evocative-to project into the "process of conventionality", the drama of an entire people (the Jewish one) and, at the same time, the remorse of the community of states, unable to prevent it and (perhaps) seeking moral absolution. The European Convention on Human Rights is one of the most important legacies of the National Socialist experience. The spectral epilogues of the Second World War and consolidated in the international order are progressively reduced. The prediction has therefore been transfigured into a mere lexical ornament[90].

Art. 7 ECHR nowadays performs a monitoring function, perhaps mnestic since it recalls the Nazi past and the legal civilization born from its own ashes which formally renounces the principle of non-retroactivity. A principle that is also based on the

90ECtHR, Vasiliauskas v. Lithuania of 20 October 2015, par. 190.

Nuremberg clause and Art. 49, par. 2 CFREU, i.e. a verbatim of formulation that seeks to interpret that the suppressions of the past do not imply any change that contemplates crimes against humanity. By calling art. 52 par. 3 the CFREU argues that

"(…) Union law grants more extensive protection" (Peers and others, 2021)[91] (in our case in favor of the right to personal liberty) and if the general principles of law recognized by nations, are a subsidiary and supplementary source, it is not clear what further preceptive scope can be recognized in art. 49 par. 2 (…)" (Peers and others, 2021).

We can say that the Nuremberg clause can be reactivated and presented to new forms of attack, to human dignity, and to a very broad area of international criminal law which does not limit crimes to the jurisdiction of the ICC. To a context of transition that is consistent with the origins of the forecast of global scope where the Grand Chamber has excluded par. 2 as we have seen in the Bosnian and Lithuanian case and has approached a paradigm of punitive path where retroactive laws are admissible explicitly and in the light of the fragmentation context of an omission of the ECtHR based on Art. 17 ECHR and on the prohibition of:

"(…) an individual from engaging in an activity or performing an act aimed at the destruction of the rights or freedoms recognized in the present Convention to victims; and this also on the assumption that Art. 15 ECHR. does not allow exceptions to legality in the event of "war or other public danger threatening the life of the nation (...) but is silent on chronologically successive transitional contexts (…). History teaches, but has no pupils, yet such a scenario would sanction the failure of the age of rights and of the tools put in place to prevent the eternal return of the same (...)" (Sudre, 2021).

91See Art. 52, par. 3 CFREU.

The de profundis of the Nuremberg clause continues its course and must certainly be addressed favorably for continuous interpretations of the jurisprudence of the ECtHR and more.

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